

for The Defense

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The Training Newsletter for the
Maricopa County Public Defender's Office

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Maricopa County Public Defender

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A total of 1,163 bills were introduced. Of those, 380 were transmitted to the governor for signing. Three-hundred and seventy-seven were signed by the governor and three became law without his signature. No bills were vetoed by the governor.

The general effective date for bills passed in the last regular session is July 17th. Practitioners should be aware, however, that many bills affecting the criminal justice system contained emergency clauses. Bills with emergency clauses are already in effect.

The Trend

Although 1993 saw some humanizing of the criminal code to offset Arizona's costly and escalating prison population, legislation in the 1994 session focused on speeding up Arizona's Death Train (the judicial murder of people), forcing inmates to pay for their own medical care and incarceration, restricting court access by inmates, and correcting anomalies in last year's massive criminal code rewrite. And, of course, there was an intense focus on the juvenile justice system. Many measures were passed to limit handgun use by juveniles, as well as law enforcement and prosecutorial abuse of forfeiture law.¹


Summaries:

The following are summaries of important criminal justice bills. All could not be covered. Where possible I've thrown in some analysis. The full text of any legislation summarized may be found in *West's Arizona Legislative Service*. Bills are listed by Title, Chapter and Number.

Death Sentences

Chapter 76, S.B. 1002

Adds new section 13-703.01 that requires the Arizona Supreme Court to conduct an independent review of the trial court's aggravation/mitigation findings whenever the death sentence is imposed. The supreme

(cont. on pg. 2) 

"Summary of Legislative Action-- Forty-First Legislature: Jail House Rock Continues by Christopher Johns

Introduction:

Basic Numbers

The second regular session of the Forty-First Legislature convened January 10, 1994 and adjourned (*sine die*) on April 17, 1994.



court may still remand to trial court for new hearing. Also sets 35-day time limit for issuance of death warrant once state post-conviction relief proceedings are exhausted.

Post-Conviction Relief--Capital Cases
Chapter 77, S.B. 1003

This bill amends A.R.S. 13-4234 and repeals A.R.S. 13-4240. Requires defendants to file post-conviction relief petitions (PCR) within 30 days after filing notice of PCR. Also prohibits death warrant from being stayed to allow for filing subsequent PCR petitions.

Prisoner Litigation
Chapter 358, S.B. 1111

Requires inmates to pay filing fees and court costs when pursuing civil litigation by amending A.R.S. 12-302. Also amends A.R.S. 31-201.01 to give the state immunity for inmate injuries. If an inmate's civil suit is non-meritorious, gives the attorney general's office power to have inmate's earned release credits forfeited!

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Aggravated Assault--Health Care Workers
Chapter 121, S.B. 1150

Amends A.R.S. 13-1204(A) by creating new section 10 to make assault against a licensed health care practitioner or an emergency medical technician a class 6 felony.

Children--Restitution Liens
Chapter 86, S.B. 1248


Amends Title 8 by creating new sections A.R.S. 8-250 and 8-251. Provides that a person entitled to restitution by a juvenile may file a restitution lien. Creates procedure for perfecting liens. Also gives juvenile court continuing jurisdiction of case for restitution purposes until child reaches 18. When juvenile reaches 18 years of age, the court is required to enter a judgment in state's favor for unpaid fees, fines, and costs, as well as

judgment for each person entitled to restitution.

Disproportionality Review
Chapter 365, S.B. 1250

This bill directs the Board of Executive Clemency (BEC) to conduct a disproportionality review of incarcerated inmates who meet all of the legislation's initial eligibility requirements. DOC must establish a procedure to provide notice to all inmates of the availability of review within 120 days of bill's effective date. Requires BEC to recommend to governor a commutation or sentence reduction if, after a hearing where the victim, prosecutor and sentencing judge are given notice of and chance to be heard, the BEC finds that two enumerated reasons are met. There is no appeal from BEC's decision. If BEC votes unanimously to commute or reduce an inmate's sentence, and the governor doesn't act on the recommendation in 90 days, it is automatically effective. A small appropriation is made for DOC to give notice.

For the Defense will provide a more detailed analysis in future issues on this legislation. However, some important provisions to keep in mind when talking with former clients are that the client must have gone to trial; plea agreement cases are ineligible; the sentence must be for a crime that was committed before January 1, 1994; and the BEC may not have previously performed a disproportionality review. The specific eligibility factors for sentences are set forth in the statute.

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for The Defense

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This bill mandates that the Arizona Auditor General conduct a performance audit of Maricopa, Pima, Coconino, and Cochise counties' victim compensation fund programs (hmm--wonder why they would do that?). Audit is to see where programs are complying with compensation rules and Victims' Rights Implementation Act. Appropriates \$80,000 for audit and requires that it be reported to counties involved, as well as legislative leaders and the Arizona Criminal Justice Commission.

Omnibus Crimes Bill
Chapter 200, S.B. 1291.

This "big" bill makes numerous changes to the Arizona Criminal Code. An emergency measure was attached to the bill so it is already in effect. Some of the most important changes are:

- * Amends Title 11 by creating A.R.S. 11-536 that gives county attorneys power to create "security" for government and "potential government" witnesses when they are subject to bodily harm. This is a "mini" witness protection program.

- * Amends Title 12 by creating A.R.S. 12-991 *et seq.* that allows prosecutors and private citizens to bring an action for "abatement" when criminal activity is creating a nuisance. This bill was brought so that so-called "crack houses" and other places where drugs are being sold may be closed down through civil proceedings.

- * Amends A.R.S. 13-105 to create a definition for "criminal street gang" and "criminal street gang member." A criminal street gang now means an ongoing "formal or informal association of persons whose members or associates individually or collectively engage in the commission, attempted commission, facilitation or solicitation of any felony act and who has at least one individual who is a criminal street gang member." Go figure. Constitutional problems? The office expressed our concern, but this is nothing. See the definition of a street gang member in A.R.S. 13-105(8). For example, if you have tattoos and wear certain (unclear what) clothing you are considered a street gang member. Any two factors or criteria creates a presumption you are a gang member.

- * Creates new subsection A.R.S. 13-604(T) that provides that the commission of any felony with the intent to promote, further or assist a criminal street gang is a dangerous and/or repetitive offense. The presumptive, minimum and maximum sentences of the felony are increased by three years. Must be stacked onto any other enhanced sentence. No release unless earned

release credit date or sentence commuted. Whew! Hope the constitutional problems are self-evident?

- * Amends A.R.S. 13-1105(A)(2) to provide that a person commits first degree murder if he is the driver of a car wilfully fleeing or attempting to flee a marked police car and another person is killed.

- * Amends A.R.S. 12-1204 to create new section C that increases classification for aggravated assault against a peace officer from class 6 to a class 2, 3 or 5 felony depending on the accused's conduct.

- * Adds new section A.R.S. 13-2308 that creates a class 3 felony for assisting a criminal syndicate for the benefit of, at the direction of, or in association with a "criminal street gang". Must have intent to promote, further or assist any "criminal conduct."

- * Amends A.R.S. 13-3102 by creating subsection B providing that a person commits misconduct involving weapons if the person supplies, sells or gives control of a firearm "to another person if the person knows or has reason to know that the other person would use the firearm in the commission of a felony." Lot of persons in there!

- * Creates section A.R.S. 13-4439, giving DPS power to establish a forensics firearms identification system to investigate "street gangs."


Juvenile Crime Omnibus Bill
Chapter 201, S.B. 1356

This bill makes numerous changes to the juvenile justice system. The following are some of the most significant enactments:

- * Creates A.R.S. 8-229 requiring the parent of a juvenile, who is alleged to have committed a delinquent or incorrigible act, to appear in juvenile court. Allows court to cite parent for contempt for failure of parent to appear.

- * Amends A.R.S. 13-1415 to permit victims of a delinquent act that involves "significant exposure" to fluids that could cause HIV to petition court for testing of the child.²

- * Amends A.R.S. 13-3111(D) to provide that if a minor unlawfully possesses a firearm while driving a car, he be fined up to \$500.00. The minor's driver's license is also suspended until age 18.

(cont. on pg. 4) 

* Additionally:

^ Requires Department of Youth Treatment and Rehabilitation (DYTR) and the juvenile court to develop length-of-stay guidelines for secure care.

^ Mandates that Arizona Supreme Court and DYTR develop common risk needs assessments to be used for children referred to juvenile court.

^ Allows DYTR to declare a bed shortage when it runs at 98% capacity thereby giving director power to allow conditional releases.

^ Appropriates almost \$1 million for DYTR to establish "boot camps" at secure facilities.

^ In certain circumstances allows for treatment of a juvenile past age 18, up to age 21, if court, juvenile and state agree to the treatment.

^ Provides that juvenile probation officers may supervise no more than an average of 35 juveniles at one time.

Drive-By Shootings Chapter 9, H.B. 2005

Amends Title 13 by creating A.R.S. 13-1209. Makes a specific classification for the crime of "drive-by shooting". "A person commits drive-by shooting by intentionally discharging a weapon from a motor vehicle at a person, another occupied motor vehicle or an occupied structure." A violation is a class 2 felony.

Prisoner Payment of Medical Expenses Chapter 332, H.B. 2014

This bill permits DOC to charge inmates a reasonable fee, not to exceed \$5.00, for medical and health care visits initiated by the prisoner. Some exceptions are provided.

Criminal Extradition Chapter 205, H.B. 2022

Amends A.R.S. 13-3845 by creating subsection B (minor amendment to subsection A). Requires a photograph or certified fingerprints to be provided to identify the subject before an extradition warrant is issued. Gives governor power to enter into agreements on extradition with other states. These changes are meant to bring Arizona into compliance with the Uniform Extradition Act.

Criminal History Information Chapter 184, H.B. 2035

Among numerous provisions, amends A.R.S. 41-1750 to allow information on traffic accident reports concerning BAC and other intoxilyzer tests to be released to public.

Aggravated Criminal Damage Chapter 17, H.B. 2112

Amends A.R.S. 13-1604 by increasing lowest level act constituting criminal damage to a class 6 felony. Any criminal damage less than \$1500 is now a class 6 felony! This bill was pushed to get at problem of so-called "hate crimes" -- defacing churches, etc.

Parole Eligibility Chapter 188, H.B. 2116.

This bill amends Title 31. Among other changes, section C is added to A.R.S. 31-412 to toughen BEC voting requirements for an inmate's release.

Criminal Code (Cleanup Bill) Chapter 236, H.B. 2117

This bill makes several so-called "technical corrections" and clarifications to the 1993 criminal code. Important changes include the following:

* Amends A.R.S. 13-604.01(C) to provide that a person who is convicted of a dangerous crime against children involving sexual abuse and who has previously been convicted of a predicate felony to be sentenced to prison.

* Amends A.R.S. 13-604.01(G) to prohibit a person who is convicted of an attempted dangerous crime against children and who has previously been convicted of a predicate felony from being eligible for release until the sentence is served, the prisoner reaches his earned release credit date or the sentence is commuted.

* Amends A.R.S. 13-710 to increase the presumptive sentence for second degree murder from 15 to 16 years.

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Among other changes, amends A.R.S. 13-3109 to increase selling or giving a firearm or ammunition to a minor from a class 2 misdemeanor to a class 6 felony. Police officers are given power to seize an unlawfully possessed firearm by a minor.

Expands parental liability for a minor's unlawful firearm use. Also requires schools to report firearm violations. Makes carrying a deadly weapon (by anyone) into a nuclear power plant a class 1 misdemeanor (has this been happening lots?).

Lastly, also allows DPS to issue permits for carrying a concealed weapon.

Homicide-Arson
Chapter 150, H.B. 2270

Amends A.R.S. 13-1105 so that a person commits first degree murder if he or a codefendant causes the death of another person (felony murder) while committing arson of a structure or property. (Prior law applied first degree murder only if the structure was occupied).

Sexual Misconduct
Chapter 149, H.B. 2314

Amends Title 13, chapter 14 by adding section A.R.S. 13-1418. Makes sexual misconduct committed by a certified behavioral health professional, licensed psychiatrist or psychologist with a patient a class 6 felony.

1. It should be noted that Dean Trebesch, Helene Abrams, and I spent a significant time analyzing and trying to lessen the negative impact of criminal justice legislation on our client community. In some instances we were successful. When appropriate, we also worked with the AACJ and the judiciary to make legislation more fair.

2. Any practitioner who gets a case involving the testing of a child for HIV as part of delinquency determination or by petition, please contact me (506-8200). I have done several motions and a special action on this issue. There are significant right to privacy and due process of law issues involved. Thanks.

(See Index of Legislation on Pg. 13) ■

OPENING STATEMENTS: Preparing a Positive Aura

I want to talk about opening statements. Okay, as you scoff--ha-ha-ha--how long has it been since that guy even did an opening? Admittedly, it's been awhile. I have, however, watched many (great, horrible and in-between) and thought a great deal about openings. In fact, I could write a short book on it. In my opinion, OPENINGS ARE THAT IMPORTANT that they deserve an entire book.

Since I can't write a book here, I'd like to just talk about some of issues that may make a difference in opening statements. Some, you may have already heard and thought about. Some, you may not have. Some, you may even disagree with. The only way you'll know for sure is to read the rest of this article.

Delivery

To me, preparing a "positive AURA" for delivering an opening statement is absolutely critical. What is a positive AURA?

A = The jury must be ATTENTIVE to you.
U = The jury must UNDERSTAND your points.
R = The jury must REMEMBER your points.
A = The jury must ACCEPT your points.


The bottom line is that every part of your delivery should be considered with the above four goals in mind. All four. If you accomplish all four in an opening statement, you may win.

There are some basics that are part of an effective delivery. Number one--there is you. Your beliefs, commitment, integrity, and believability. Number two, the opening must be organized. You also should consider how your voice is used, your body, your actions, the words chosen, and the props to illustrate your points.

Getting An Attentive Jury

How do you get an attentive jury? Keep a few important principles in mind. BREVITY is one! Mark Twain said, "No one is converted after the first 20 minutes of the sermon." There is only so much information people (a juror) can take in. It's bad enough that we don't get the first shot.

The good news, however, is if your opening is short, concise, to the point, entertaining and demands that jurors keep their attention on you--your client is winning. Too many words, and your jurors will shut down. IF they're shut down they cannot hear you.

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You also get jurors' attention when they sense you are committed. Commitment comes from intensity and the belief that your client is INNOCENT (factually or legally). If the jurors sense you are disinterested, they will be disinterested as well.

Getting a jury to be attentive means being interesting. You must say something CATCHY. If you missed the media revolution that's going on it's going to be too bad for your client. You need a HOOK. This is the era of the sound bite--the spin--the 20-second spot. All cases can be reduced to a hook and a catchy phrase. The hook should encapsulate your theory of the case. You may then also talk about themes.

For example, this is a case about betrayal. This is a case about looking like someone else. This is a case about speeding, not being drunk.

To get your hook across, consider putting it on a flip chart. Write it out. Also, consider outlining the entire opening and using a flip-chart (this is the only way I can remember my opening since I don't use notes).

There's too little space here to talk about voice. Suffice it to say, however, that it is one of the greatest tools a lawyer has. It simply cannot be monotone if you want to keep the jury's attention. Consider using your voice like a tool. Vary pitch, pace, style and volume.

Use the body. This is a big one. Before I begin an opening, I like to take a deep breath and look at every juror. When that one friendly face sticks out, that's usually where I begin. Remember, some silence before you begin is a dramatic way to obtain jurors' attention. Don't be afraid of silence.

Avoid barriers. Okay, it's a big debate. I say, however, that lecterns, desks, tables or any obstruction that separates me from the jury detracts from my communication. Separation means detachment. I am not detached and I do not want my jurors to be detached. Just the opposite. I want them to identify with me and if possible, my client!

When thinking about your body, don't be afraid to consider scripting some movements. Jurors have nothing to do but listen and watch. They see everything you, the prosecutor, your client, the witnesses, the judge, and court staff do. When you are talking in front of them they should be watching you. Your movements should be purposeful. Don't walk and talk at the same time. Don't be afraid to choreograph and think about where you should stand when making important points. Your client's liberty is at stake. Some time thinking about your delivery is the least you can do to improve your opening salvo against the government.

Words and Storytelling

If you have kids, maybe you're a leg up. Kids don't want to be told boring stories (try telling a boring

one sometime). Kids don't want you to use words they can't understand. Neither do jurors. It's not that they are kids, but they are human beings.

Storytelling is an art that has been passed down since before Homer. It is a powerful tool. Probably, about a million years ago humans (or their ancestors) were sitting around fires--before the television tube took over storytelling duties--telling stories. If Ug couldn't tell a good story his audience either left or fell asleep. Jurors can't leave so they'll just fall asleep.

A trial is a human drama that some lawyers just try to reduce to listing facts. Boring! Make it happen in their minds. This isn't just facts; it's about flesh and blood--real human beings.

USE ACTIVE VOICE. Active voice in storytelling and in writing is more engaging and interesting. For example, "Find my client not guilty. It is a fair verdict" is active. "A verdict of not guilty is the fair verdict" is passive. "The police arrested Mr. Client" is active. "An arrest of Mr. Client was made" is passive.

Since the art of storytelling isn't something that may be covered in a few short paragraphs, here's some of the nutshell version. Remember:

1. Set the scene.

Before you whiz to the facts, set the scene. It's usually no great lawyerly feat to be able to get in the few questions during the trial that will provide the basis for vividly setting the scene. For example, in a bar fight case where your defense is self-defense, describe the physical location in your opening: On Saturday night, June 9th, the Twilight Bar was dark and smoky. Loud country and western music was blaring another somebody-did-someone-wrong song. In the dim light bar patrons were sitting at tables and playing pool. At the pool table two big, white men holding pool sticks were talking. They were both dressed in black shirts with no sleeves. Their arms were completely covered by tattoos. That's more interesting than "there were two guys in a bar."

2. Run the Videotape

The best way I can describe how I visualize the opening after the scene is set is that it is like running a videotape in my head.

How's that work? Picture the events in your mind. Make sure that you understand the story from start to finish. Any gaps in the story need to be filled in by investigation. Once it is clear and complete, picture the

(cont. on pg. 7) 

story in your mind as if it were on TV. That's what jurors will best understand. When it is time to tell the story of your case in the opening, just run the video of the story in your mind, and tell the jurors the story as you are seeing it.

3. Techniques

The real key is the technique you use to tell the story. The same old boring stuff just doesn't cut it. As mentioned, you should consider using present tense when possible.

Use *visualization*. Invite the jurors to see events unfold before them, like setting the bar scene above.

You might want to change it to something like: Walk into the Twilight Bar with me on Saturday June 9th. It's dark and smoky. Music is blaring. The room is crowded and two large, white men dressed in black are standing at the pool table. Their shirts are sleeveless and their arms completely covered with tattoos.

Flash back or flash forward. There's no rule that says you have to begin a story at the beginning, the middle or the end. You may start anywhere. Maybe starting the story at the point that is most critical to your case is best! Then flash back (just like TV) to something earlier or forward to something later.

"Bang, bang, bang, BANG! 'It's the police open up. We have a warrant for your arrest for a robbery that happened last Tuesday night.' Joe Client stood in handcuffs as police swarmed around his apartment. If they had asked, they would have found out he was working at the neighborhood grocery that night."

Another storytelling device is what is called *parallel action or development*. You may present the story of your case through different parties. It may be separately or a little at a time. Then bring them together at a critical moment most important to your theory of the case. Example:

"It's midnight and Billy Joe Badenuff is walking out of the Twilight Bar. Two men approach, dressed in black. At the same time on the other side of town, my client is sitting down to watch his favorite TV program, 'The Public Defenders'."

Freeze frame. Take the most critical moment that is consistent with your theory of the case and paint it in minute detail.

Also consider the *"interview"* technique. Tell the story of the case by following the police through (their inept) investigation or the interview of a critical witness (hopefully one that may win the case for you). Example:

"Officer Snook arrived at the scene and spoke to Mr. Victim. Q: So, tell me what happened? A: This guy

came up behind me, hit me with something and ran away. Q: Did you see him coming? A: No. He came out of nowhere. Q: Can you tell me about his face? A: No. Not really."

Remember, an opening statement need not be a stale, dry experience. It may be a rich, interesting, and exciting part of the trial where you advance the most important elements of your theory of the case. Be creative. It doesn't have to be like bungee jumping--but

is shouldn't be so unimaginative that you sound like a doofus. Mock your opening in front of other lawyers. If you can't find other lawyers, let me know. We can set aside some time. Our clients are worth getting the best we have to offer them. It's unfair not to take the time necessary to prepare a good opening. More next month. ^CJ■

Take the most critical moment that is consistent with your theory of the case and paint it in minute detail.

Arizona Advance Reports

Volume 148

State v. Burkett,
148 Ariz. Adv. Rept. 9 (Div. 1, 9/16/93)
Judge B. Michael Dann

Defendant pled guilty but fled prior to sentencing. He later was found in New York serving another sentence. He wrote to Arizona requesting to be sentenced and have the charges run concurrent to his New York sentence. The state refused. After completing his New York sentence, defendant was extradited to Arizona. He moved to dismiss the indictment alleging that the state's failure to act on his request violated the Interstate Agreement on Detainers, Rule 8.3(a) of the Arizona Rules of Criminal Procedure and his constitutional right to a speedy trial. The trial court found dismissal was required under both the Interstate Agreement on Detainers and Rule 8.3(a). The state appealed.

The Interstate Agreement on Detainers (A.R.S. § 31-481) does not apply to probation violation detainers, *Carchman v. Nash*, 473 U.S. 716 (1985) and also does not apply to sentencing detainers. But, *see, Tinghitella v. California*, 718 F.2d 308 9th Cir. (1983).

(cont. on pg. 8) ☞

Defendant claims that the state's action violated his right under Rule 8.3(a). However, Rule 8.3(a), like the Interstate Agreement on Detainers, applies only to trials, not sentencing.

Defendant also claims that the state's action denied him his constitutional right to a speedy trial. The guarantees to a speedy trial found in the United States and Arizona Constitutions apply through sentencing. To determine if a violation has occurred, the court must consider the length of the delay, the reason for the delay, the defendant's assertion of his right, and any prejudice to the defendant. *Barker v. Wingo*, 407 U.S. 514 (1972). The delay in this case of twenty-three months between the defendant's request for sentencing and his extradition to Arizona is enough to trigger an inquiry. Because the delay requires closer scrutiny, it is also impossible to analyze the prejudice to the defendant based upon the present record. The case is remanded to the trial court with directions to consider the defendant's claim that his constitutional right to a speedy sentencing was violated. [Represented on appeal by Garrett W. Simpson, MCPD.]

State v. Pitts,
148 Ariz. Adv. Rept. 13 (Div. 1, 9/21/93)
Judge Jay Natoli

Defendant pled guilty to a felony DUI and was sentenced to an aggravated term. The factual basis for the felony plea was that his license was suspended or revoked at the time he was driving under the influence. At sentencing, the trial judge gave him an aggravated term finding his prior DUI's as aggravating factors. Use of an element of the offense as an aggravating factor is permissible under *State v. Lara*, 171 Ariz. 282 (1992). However, in the DUI context *State v. Orduno*, 159 Ariz. 564 (1989) controls. The Supreme Court in *Orduno* intended to carve an exception to the *Lara* rule for DUI cases. Logic dictates that *Orduno* rather than *Lara* controls. Under *Orduno* it is improper to use an element of the offense as an aggravating factor. The matter is remanded for resentencing.

State v. Sexton,
148 Ariz. Adv. Rept. 19 (Div. 1, 9/23/93)
Judge Colin F. Campbell

Defendant shot a gun at the front of a house. He pled guilty to endangerment. Because of defendant's actions, the owners of the home lost their insurance coverage. The owners were able to obtain a new policy but the new policy did not include liability coverage. The plea agreement stated that the defendant would pay restitution, including future restitution for any loss that occurs to the victims within the next three years that would have been covered under the old policy, but not the

new policy.


Defendant argues that any losses the owners suffer that are not covered under the new policy are consequential damages which are improper for restitution. A.R.S. § 13-603(c) calls for restitution for economic losses. Economic losses do not include consequential damages A.R.S. § 13-105(11). Such damages do not directly flow from the action of the defendant but only from the result of such acts. Any loss which the victims might suffer in the future as a result of having no homeowners' liability insurance is too indirect to be the subject of statutory restitution. Such future losses would be the result of the defendant's conduct combined with the action or inaction of others and constitute consequential damages. That portion of the restitution order is vacated. [Represented on appeal by James H. Kemper, MCPD.]

State v. Bingham,
148 Ariz. Adv. Rept. 23 (Div. 1, 9/23/93)
Judge Robert L. Gottsfield

Defendant was convicted of a class 5 felony after a jury trial. During voir dire, a member of the panel revealed that he was predisposed to favor the testimony of police officers. The trial judge asked the perspective juror no further questions. Defendant moved to strike the panelist for cause. The trial judge denied the motion. The defendant utilized one of his peremptory challenges to remove this member of the panel. Defendant exhausted all of the peremptory challenges allotted to him by law. Defendant claims that it was error for the trial judge to fail to remove this juror. A juror is not impartial and should be excused for cause when the juror indicates a predisposition for or against a party or witness. Although a potential juror who initially appears prejudiced may be rehabilitated, the trial judge asked this juror no further questions. A juror's inclination to credit the testimony of police officers more than other witnesses is grounds for dismissing the juror. Failure to remove this juror for cause requires reversal. [Represented on appeal by Lawrence S. Matthew, MCPD.]

State v. Larriva,
148 Ariz. Adv. Rept. 27 (Div. 2, 9/23/93)
Judge Michael D. Alfred

Early one morning, the defendant was found stranded in his car in a parking lot. The car was high-centered on a curb. The defendant was sitting in the driver's seat gunning the engine and spinning the wheels.

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The police were called and they arrested the defendant for DUI. A tow truck driver who removed the car later testified that no one could have moved the vehicle by driving it and it could not have been removed by simply pushing it over the curb. A motion to dismiss was granted and the state appealed.

Driving while intoxicated may be committed by exercising actual physical control over a vehicle while intoxicated. The element of actual physical control is shown where a defendant has the apparent ability to start and move the vehicle. The inoperability of a vehicle does not preclude a finding of actual physical control. The focus is upon the occupant and the nature of the authority he exerts over the vehicle. Where there is a legitimate inference that the car was where it was because of the defendant's choice, it follows that the defendant was in actual physical control. To hold otherwise could conceivably allow an intoxicated driver whose vehicle was rendered inoperable in a collision to escape prosecution. In this case, the fact that the car could not be readily driven off the curb does not preclude a finding of actual physical control. The order of dismissal is reversed. [See also special concurrence.]

Okeani v. Superior Court,
148 Ariz. Adv. Rept. 37 (Div. 1, 9/28/93)
Judge Stephen D. Sheldon

The defendant was charged with sexual assault. The public defender representing the defendant learned that a fellow public defender represented the victim in an unrelated juvenile matter. The defendant's lawyer obtained a copy of the police report from the victim's juvenile file for impeachment purposes. The trial judge ordered the defendant's lawyer to return the police report and refrain from discussing the matter with his partner who represented the juvenile. The defendant's lawyer moved to withdraw based upon a conflict of interest. The trial judge denied the motion. The defendant's attorney sought special action relief.

The trial judge erred in denying the motion to withdraw. The public defender's office could not ethically represent both the defendant and the alleged victim. Ethical Rule 1.7 prohibits representation where the interests of one client will be directly adverse to another client. Defendant's counsel was bound to zealously represent his client including impeaching the victim. However, since the victim was also a client of his office, fulfilling that duty would have adversely affected another client. The choice between zealously representing the defendant or protecting the victim from impeachment is a clear conflict which requires withdrawal. Lawyers associated in a firm may not represent conflicting interests for current or former clients. [Represented on special action relief by Timothy J. Ryan, MCPD.]

Estate of Vigliotto,
148 Ariz. Adv. Rept. 63 (Div. 2, 9/28/93)
Judge Robert R. Bean

Defendant, a convicted felon, died before completely paying his restitution. The state may make a claim for restitution against the estate. While a criminal action abates upon the death of the defendant, the statutory restitution lien (A.R.S. § 13-806) survives the death of the defendant.


State v. Winkler/Superior Court,
148 Ariz. Adv. Rept. 65 (Div. 2, 9/28/93)
Judge Richard A. Winkler

The real party in interest was charged with hindering prosecution. The state requested a special instruction on hindering prosecution. The judge was going to give RAJI Instruction 25.12 on hindering prosecution. The state sought special action relief. The recommended Arizona jury instruction requires proof that the defendant hindered the prosecution of a person *charged with a felony*. A.R.S. § 13-2512(a) does not require that the person be charged with a felony. RAJI 25.12 is in error where it requires proof that the person was already charged with a felony. Special Action relief granted.

State v. Benson,
148 Ariz. Adv. Rept. 67 (Div. 1, 9/30/93)
Judge Gregory H. Martin

Defendant pled guilty and was placed on probation for an undesignated offense. After the expiration of the probationary term, the sentencing judge ordered a hearing on whether the offense should be designated a felony or a misdemeanor. Notice was sent to the attorneys for the parties and the probation officer. At the hearing, defense counsel indicated that she had unsuccessfully attempted to contact the defendant by writing to his last known address. The trial judge designated the offense a felony.

Defendant claims that the designation of his class 6 offense could not occur in his absence. The defendant had a right to actual notice and a right to an opportunity to be heard with regard to this issue. Both parties must have an opportunity to present conflicting facts and equitable considerations before the trial judge exercises his discretion in designating the offense. Denial of notice or an opportunity to be heard violates a defendant's right to due process under the state constitution.

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The designation of the offense occurred six weeks after the expiration of the defendant's probation. Defendant contends that the matter should have been decided prior to the termination of his probation or on the date it was to terminate. An undesignated offense is treated as a felony for all purposes until such time as the court may actually enter an order designating the offense a misdemeanor. Either the defendant or the state may request a hearing on the question of whether the court should designate the offense a misdemeanor. The trial court's order designating the offense a felony is vacated. [Represented on appeal by Helene F. Abrams, MCPD.] ■

May Jury Trials

April 28

Rena Glitsos: Client charged with two counts of sexual assault and one count of sexual abuse. Trial before Judge D'Angelo ended May 5. Client found guilty of one count of sexual assault, **not guilty** of one count of sexual assault, and **not guilty** of sexual abuse. Prosecutor J. Beatty.

May 2

Robert Corbitt: Client charged with aggravated assault. Trial before Judge Sheldon ended May 5. Client found guilty of disorderly conduct and **not guilty** of aggravated assault. Prosecutor V. Cook.

Darius Nickerson: Client charged with attempted manslaughter. Trial before Judge Bolton ended May 12. Client found **not guilty**. Prosecutor P. Howe.

May 3

Elizabeth Melamed: Client charged with sale of narcotic drugs (with priors). Investigator B. Abernethy. Trial before Judge Galati ended May 5 with a hung jury. Prosecutor Schlittner.

Joseph Stazzone: Client charged with production of marijuana. Trial before Judge Seidel ended May 5. Client found **not guilty**. Prosecutor Sullivan.

Thomas Timmer: Client charged with burglary and theft. Investigator C. Yarbrough. Trial before Judge Hilliard ended May 5. Client found guilty. Prosecutor R. Wakefield.

May 4

Robert Ellig: Client charged with first degree murder. Investigator C. Yarbrough. Trial before Judge Dougherty ended May 20. Client found guilty of second degree murder. Prosecutor T. Sanders.

Donna Elm: Client charged with two counts of aggravated DUI, two counts of DUI, and driving on a suspended license. Trial before Judge Hauser ended May 6. Client found guilty. Prosecutor Bartlett.

May 5

Jerry Hernandez: Client charged with aggravated DUI. Investigator G. Beatty. Trial before Judge Barker ended May 9. Client found guilty. Prosecutor T. Tejera.

May 9


John Brisson: Client charged with two counts of DUI (with one prior and while on parole). Trial before Judge Dann ended May 11. Client found guilty of one count of suspended license and one count of DUI. Prosecutor T. Doran.

James Cleary: Client charged with two counts of child molestation and one count of sexual conduct with a minor. Investigator N. Jones. Trial before Judge Hertzberg ended May 11. Client found guilty on one count of child molestation and one count of sexual misconduct; hung jury on one count of child molestation. Prosecutor Beatty.

Peggy LeMoine: Client charged with aggravated DUI. Investigator P. Kasieta. Trial before Judge Hauser ended May 13. Client found guilty. Prosecutor Manjencich.

May 10

Terry Bublik: Client charged with possession of narcotic drug, possession of drug paraphernalia (with priors and while on release status). Investigator B. Abernethy. Trial before Judge Hauser ended May 13. Client found guilty. Prosecutor A. Davidon.

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Albert Duncan: Client charged with three counts of criminal damage and one count of misdemeanor criminal damage. Trial before Judge Topf ended May 11. Client found guilty (misdemeanors). Prosecutor Kane.

Slade Lawson: Client charged with sale of narcotic drug. Investigator G. Beatty. Trial before Judge Portley ended May 17. Client found guilty. Prosecutor W. Winter.

Patricia Ramirez: Client charged with aggravated assault. Investigator C. Yarbrough. Trial before Judge Hilliard ended May 12. Client found guilty. Prosecutor D. Palmer.

Daniel Sheperd: Client charged with theft, F3. Trial before Judge Dougherty ended May 11. Client found guilty, F5. Prosecutor Hinchcliffe.

May 11

Gary Hochsprung: Client charged with possession of dangerous drugs for sale. Trial before Judge Howe ended May 16 in a mistrial. Prosecutor Daiza.

Vicki Lopez: Client charged with aggravated assault (dangerous). Trial before Judge Ryan ended May 19 with a hung jury. Prosecutor D. Macias.

May 12

Todd Coolidge: Client charged with aggravated assault. Investigator M. Breen. Bench trial before Judge Barker ended May 13. Client found guilty. Prosecutor K. Mills.

David Goldberg: Client charged with possession of dangerous drugs and possession of drug paraphernalia. Trial before Judge Trombino ended May 17. Client found **not guilty**. Prosecutor Sullivan.

Ray Schumacher: Client charged with possession of drug paraphernalia and resisting arrest. Trial before Judge Sheldon ended May 12. Client found guilty. Prosecutor V. Cook.

May 16

Kevin Burns: Client charged with theft. Investigator P. Kasieta. Trial before Judge Schwartz ended May 18th with a hung jury. Prosecutor McCormick.

Dennis Farrell: Client charged with aggravated assault (dangerous). Investigator N. Jones. Trial before

Judge Chornenky ended May 20. Client found guilty. Prosecutor M. Brnovich.

Elizabeth Langford: Client charged with two counts of aggravated assault (dangerous). Investigator V. Dew. Trial before Judge Barker ended May 18. Client found guilty of two counts of disorderly conduct. Prosecutor W. Baker.

Louise Stark: Client charged with two counts of aggravated assault and one count of resisting arrest. Trial before Judge Dann ended May 18. Client found guilty on one count of aggravated assault and one count of resisting arrest; **not guilty** on one count of aggravated assault. Prosecutor R. Wakefield.

Kevin White: Client charged with kidnapping, attempted sexual assault and burglary. Investigator V. Dew. Trial before Judge Sheldon ended May 20. Client found **not guilty** on the burglary charge, found guilty of kidnapping and attempted sexual assault charges. Prosecutor R. Campos.

May 17

Candace Kent: Client charged with burglary. Trial before Judge Anderson ended May 19 in a mistrial. Prosecutor J. Blomo.

Peggy LeMoine: Client charged with possession of marijuana. Investigator J. Allard. Trial before Judge Hauser ended May 25 with a hung jury. Prosecutor Forshey.


May 18

Russell Born: Client charged with criminal damage. Bench trial before Judge Dougherty ended June 1. Client found guilty. Prosecutor Como.

Jeanne Steiner: Client charged with aggravated assault. Investigator R. Barwick. Trial before Judge Hall ended May 18. Charge dismissed with prejudice. Prosecutor T. Duax.

May 25

Dan Lowrance: Client charged with two counts of armed robbery and two counts of kidnapping. Trial before Judge Hertzberg ended June 2. Client found guilty. Prosecutor Martinez.

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May 30

Philip Vavalides: Client charged with two counts of sale of narcotic drugs. Trial before Judge Brown ended June 1. Case dismissed without prejudice. Prosecutor J. Bernstein.

May 31

Gary Bevilacqua: Client charged with two counts of assault. Investigator H. Jackson. Trial before Judge Hall ended June 2. Client found **not guilty** on one count and jury was hung on one count. Prosecutor V. Harris.

Michael Hruby: Client charged with aggravated DUI. Investigator C. Yarbrough. Trial before Judge Dougherty ended June 1 in a mistrial. Prosecutor Doran. ■

Bulletin Board

Dean Trebesch Named "Public Lawyer of the Year"

The Maricopa County Public Defender, **Dean Trebesch**, was named the distinguished Public Lawyer of the Year by the Maricopa County Bar Association Public Lawyers Division. In a letter advising Dean of the award, the Association noted, "The Board of Directors for the Public Lawyers Division was impressed by the fact that you have served as a public lawyer throughout your distinguished career, and by your many accomplishments as the Maricopa County Public Defender."

The award was presented to Dean at a luncheon meeting on Wednesday, June 22 at the Arizona Club.

Speakers Bureau

On March 25, **Louise Stark** spoke at the State Bar's seminar "Representing the Victim Under the Victims' Bill of Rights."

Helene Abrams and **Louise Stark** served on a 12-person panel at the Attorney General's "First Annual High School/Juvenile Justice Forum" on May 17.

In early June, **Christopher Johns** used vacation time to be part of the faculty at New York Legal Aid's

Criminal Division Trial College in Manhattan. The week-long program is designed to incorporate the format of the National Criminal Defense College and National Legal Aid & Defender Association Trial Advocacy program.

August 13 - 20, **Christopher Johns** and **Mara Siegel** will serve as faculty members at the Arizona State Bar's 9th Annual Arizona College of Trial Advocacy. This college is an intensive workshop that provides practical "hands-on" training for trial lawyers.

Newest Bureau Member: **Gary Hochsprung** of Trial Group A.

Summer Interns/Volunteers

Jamie Lee Christie, Stephanie Christie's sister, has joined our volunteer ranks for the summer. Jamie is working with Elia Hubrich on Tuesday and Thursday mornings, making copies and running errands to earn 300 hours of community service work as part of a graduation requirement of her school.

Stephanie Dawson (Anita Rosenthal's "niece-in-law") has volunteered to coordinate the paperwork for Group A's probation violation unit. She graduated from ASU with a degree in Social Work, and is interested in employment as a Client Services Coordinator or as a Probation Officer. Stephanie also is considering going to law school. She recently returned to Arizona after moving to Texas with her husband. While there, she worked in a hospice.

Joan Dowden started work as a summer intern for Jeff Reeves on June 06. She will graduate from ASU's School of Justice Studies in May of 1995, and she is interested in familiarizing herself with the criminal justice system. Joan has a real estate license, was a Senator for ASU in 1993, and has a part-time position as a class coordinator at Michael's Arts and Crafts.

Angela Fairchild began her summer internship through the American Institute with our Initial Services Specialists the first part of June. She has a B.S. in Public and Environmental Affairs from Indiana University, and now is studying to become a paralegal. Her long-term goal is to follow in her father's footsteps to become an attorney.

Brian McIntyre is our Administration Intern through ASU's School of Justice Studies. Brian's background includes library science, purchasing, printing, and inventory controls. Brian is a four-year member of Justice Studies Students Association (including a term as president), was selected Most Outstanding Academic Cadet in the Air Force ROTC, and made the Dean's Honor List. He is interested in helping us with our law library, with the fixed assets listing, and with the writing of essential functions for ADA compliance. Brian's long-term goal is to become a civil rights attorney. ■

QUICK INDEX OF MAJOR LEGISLATION AFFECTING CRIMINAL JUSTICE SYSTEM

<u>Bill No.</u>	<u>Short Reference Title</u>	<u>Chapter No.</u>
SB 1002	Death Sentence Review	Ch. 76
SB 1003	Post-Conviction Relief	Ch. 77
SB 1150	Assault; Health Care Worker	Ch. 121
SB 1177	Victim Fund; Supervision Fee	Ch. 125
SB 1182	School for Juvenile Delinquents	Ch. 266
SB 1220	Protection Order; Nondisclosure	Ch. 268
SB 1248	Juvenile Crime; Restitution Lien	Ch. 86
SB 1289	Victim Compensation Funds-Audits	Ch. 127
SB 1291	Criminal Code Expansion; Omnibus	Ch. 200
SB 1356	Juvenile Crime; Omnibus	Ch. 201
HB 2005	Drive-By Shooting	Ch. 9
HB 2112	Criminal Damage; Aggravated	Ch. 17
HB 2117	Crime Sentences; Prisoner Furlough	Ch. 236
HB 2131	Firearms; Minors; Concealed	Ch. 109
HB 2187	Boating DUI	Ch. 276



FOR THE DEFENSE JUNE INDEX*

Percentage of carjackings accounting for the 1.9 million vehicle thefts between 1987 and 1992: 2%

Sex more likely to be a victim of a carjacking: male

Race most likely to be a victim of a carjacking: black

Percentage of victims injured in a completed carjacking: 24%

Percentage of all victims of attempted or completed carjackings who suffered a serious injury: 4%

Percentage of offenders who used a weapon in all attempted and completed carjackings: 77%

Percentage of offenders armed in a completed carjacking: 82%

Percentage of offenders armed in an attempted carjacking: 71%

Weapon most commonly used in a completed carjacking: handgun

Percentage of offenders armed with a handgun in a completed carjacking: 59%

Time carjacking most likely to occur: evening or night

Percentage of all carjackings that happened after dark: 66%

Percentage of carjackings in a garage or parking lot away from home: 29%

Percentage that occurred in an open area like a street: 45%

Percentage that occurred near victim's home: 18%

Percentage of carjackings that were committed by offenders 18-20 years of age: 12%

Percentage of victims who identified the offender's race as white: 32%

Percentage of victims in carjackings who identified the offender's race as black: 49%

Percentage of victims in carjackings that identified the offender's race as Asian or American Indian: 6%

Percentage of all carjackings committed by males: 87%

Percentage of all carjackings committed by males and females together: 6%

Percentage of carjackings where victims said that a woman committed the offense alone: 1%

Percentage of cases where the victim could not identify the sex of the offender: 6%

*Source: U.S. Department of Justice: Bureau of Justice Statistics Bulletin: Carjacking (March 1994).
Compiled by the editor for *for the Defense*

